U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 October 2006

Case No. 2004-BLA-6712

In the Matter of:
J.R. OBO Estate of R.P.[1]
Claimant,

v.

JERICOL MINING, INC.
Employer,
and
KENTUCKY COAL PRODUCERS
SELF-INSURANCE FUND
Carrier,
and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Ron Carson,
On behalf of Claimant

Rodney E. Buttermore, Jr., Esq.
On behalf of Employer/Carrier

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

[1] The Department of Labor has directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant family members in any document appearing on a Department of Labor web site starting prospectively on August 1, 2006, and to insert initials of such claimant/parties in the place of those proper names. This order only applies to cases arising under the Black Lung Benefits Act, the Longshore and Harbor Workers' Compensation Act, and FECA. In support of this policy change, DOL has directed submission of a proposed rule change to 20 C.F.R. Section 725.477, proposing the omission of the requirement that decisions and orders of Administrative Law Judges contain the claimant/parties' initials only, to avoid unwanted publicity of those claimants on the web, and has installed software that prevents entry of the full names of claimant parties on final decisions and related orders. I strongly object to that policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank,* 951 F. 2d 320 (11th Cir. 1992) and

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. Sections 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[2]

On August 25, 2004, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 40).[3] A formal hearing on this matter was conducted on April 18, 2006, in Harlan, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call, examine, cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES[4]

The issues in this case are:

1. Whether the Miner has pneumoconiosis as defined by the Act;

2. Whether the Miner's pneumoconiosis arose out of coal mine employment;

3. Whether the Miner is totally disabled; and

4. Whether the Miner's disability is due to pneumoconiosis.

(DX 36; Tr. 8).

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those collected at 27 Fed. Proc., L. Ed. Section 62:102 (Thomson/West July 2005). Furthermore, I strongly object to the specific direction by the DOL that Administrative Law Judges have a "mind-set" to use the complainant/ parties' initials if the document will appear on the DOL's website, for the reason, *inter alia,* that this is not a mere procedural change, but is a "substantive" procedural change, reflecting decades of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge's decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial "mind-set" constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F. R. Section 725.455(b), not merely that presently contained in 20 C.F.R. Section 725.477 to state such party names.

[2] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr." refers to the official transcript of this proceeding.

[4] At the hearing, Employer withdrew as contested issues the issues of the Claimant's timeliness of filing, Miner's status as a miner, whether the Employer is the Responsible Operator, and whether the Employer has secured the payment of benefits. (Tr. 8).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

R.P. ("Miner") was born on June 21, 1947. (DX 2). He completed fifth grade, and there is no evidence of a GED. (DX 2). Miner married J.P. on April 14, 1967 in Jonesville, Virginia. (DX 13). However, Miner's wife passed away on October 24, 1999 in Harlan, Kentucky. (DX 13). They had three children, all of whom are currently independent. (Tr. 11; DX 39). J.R. ("Claimant") is one of the three children proceeding to prosecute the claim on behalf of the Miner's estate. Miner worked in the coal mines from 1965 until 1991, with a four year period out of the mines between 1980 – 1984. (DX 3; DX 4). Due to breathing problems, Miner ceased mining coal on August 5, 1991. (DX 2).

Miner describes the physical requirements of the job to consist mostly transporting coal from the mine to the beltline, which included: (1) operating the shuttle car; (2) operating the scoop; and (3) hand loading coal. (DX 4). Miner asserts he stood for approximately two hours a day, sat for six hours a day, and spent "some time" crawling. (DX 4). Miner also asserts he carried and lifted over 100 pounds per day. (DX 4).

Procedural History

Miner filed a claim for benefits under the Act on approximately October 22, 2001.[5] (DX 2). On April 10, 2003, the District Director issued a Proposed Decision and Order Denial of Benefits. (DX 34). The Director found that Miner established the presence of pneumoconiosis, that the disease was caused, at least in part, by Miner's coal mine work, and that the miner was not totally disabled by the disease. (DX 31). Counsel for Miner requested a formal hearing on May 9, 2003. (DX 35). On July 1, 2003, this matter was transferred to the Office of the Administrative Law Judges for a formal hearing. (DX 38). A formal hearing was scheduled to be held on June 22, 2004 in Benham, Kentucky. (DX 39). However, this office was informed on November 17, 2003 that Claimant had passed away on September 14, 2003. (DX 39). On March 26, 2004, I issued an Order of Remand to the District Director to determine the proper party in this claim. (DX 39). On May 27, 2004, the children[6] of Miner notified the Office of Workers Compensation that they wished to continue the claim on behalf of the Miner's estate, a request which was granted. (DX 39). In response to the children's request, the record was returned to this office with the request for another formal hearing on August 25, 2004. (DX 40).

[5] Miner did not date the claim form. The above date given as an approximation derives from the date the form was received.

[6] J.R. is serving as the representative for all three children, and consequently the estate of R.P.

Length of Coal Mine Employment

The parties have stipulated that Miner worked as a coal miner seventeen years. (Tr. 8). The record affirms this stipulation. (DX 3; DX 8; DX 10; DX 11). The record shows Miner worked for Garfield Coal 1965-1967; Blue star Darby Coal 1967-1968; Grays Knob Coal 1967; Warner Coal 1967; Shackleford Coal 1967-1970; Seagraves Coal 1968; Karst Robbins Coal, 1970-1971; Oxford Mining 1970; Eastover Mining 1970-1980; Bob & Rob Coal 1980-1982; Sugar Rock Coal 1981; CNC Coal 1982; Dan Del Coals 1894-1985; Wet Creek Coal 1984; Gabriel Mining 1985; Karson Robbins Coal 1985-1987; Harlan-Bell Coal 1986-1988; Lamar Coal 1987-1987; and Jericol Mining 1989-1991. (DX 3; DX 11). Miner ceased working for Jericol Mining in August of 1991 and has not worked as a coal miner since. (DX 3). Therefore, I find that Miner engaged in seventeen years of coal mine employment as a miner.

Miner's last coal mine employment was in the state of Tennessee. (DX 4). Therefore this claim is governed by the law of the Sixth Circuit. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (en banc).

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of Sections 725.494 and 725.495. The District Director identified Jericol Mining, Inc. ("Jericol") as the putative responsible operator. (DX 34). Given the clear employment evidence in the record, and Jericol's withdrawal of this issue at hearing, I find that Jericol is the responsible operator in this case.

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standards in order to constitute evidence of the fact for which it is proffered. *See* Sections 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, or physician's opinions that appear in a medical report must be admissible under Section 725.414(a)(2)(i) and (3)(i) or Section 725.414(a)(4). §§ 725.414(a)(2)(i), (3)(i), and (a)(4). In rebuttal of the case presented by the opposing party, each party shall also be entitled to submit no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(ii), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(i), and (a)(3)(iii). Notwithstanding the limitations of Sections 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under Section 725.414. § 725.406(b).

Miner selected Glen R. Baker, M.D., F.C.C.P. to provide his Department of Labor sponsored complete pulmonary examination. (DX 15). Dr. Baker conducted the examination on December 6, 2001. (DX 16). I admit Dr. Baker's report under Section 725.406(b).

Claimant completed a Black Lung Benefits Act Evidence Summary Form. (CX 2). Claimant designated the following as initial evidence: Dr. Baker's x-ray, PFT, and ABG studies conducted on December 6, 2001; Dr. Alexander's x-ray study of January 19, 2003; Dr. Miller's x-ray study of December 6, 2002; and Dr. Narayanan's PFT studies conducted on March 8 and November 4 of 2002. Additionally, the Claimant included Dr. Baker's medical report, dated December 6, 2001. Claimant's evidence complies with the requisite quality standards of Sections 718.102-107 and the limitations of Section 725.414(a)(3). Therefore, I admit the evidence Claimant designated in its Summary Form.

At the hearing, Claimant's attorney informed me that he would require additional time to submit a report from Dr. Cruz. At the hearing, I stated I would consider the report as a reserved document and set the deadline for filing medical evidence until June 19, 2006. (Tr. 7; 17). The report from Dr. Cruz was never submitted to this office.

Employer completed a Black Lung Benefits Act Evidence Summary Form. (EX 1). Employer designated the following as initial evidence: Dr. Dahhan's x-ray, PFT, and ABG studies conducted on January 25, 2002; and Dr. Spitz's x-ray study conducted on March 29, 2002. Employer designated the following as rebuttal evidence: Dr. Spitz's x-ray study conducted on September 17, 2003; and Dr. Poulos's x-ray study conducted on January 31, 2003. Employer did not put forth a medical report for consideration. Employer's evidence complies with the requisite quality standards of Sections 718.102-107 and the limitations of Section 725-414 (a)(3). Therefore, I admit the evidence Employer designated in its Summary Form.

At the hearing, Employer requested time to submit a rebuttal to Dr. Cruz's report. (Tr. 7). Since the Cruz report was never submitted, a rebuttal was not needed. However, Employer timely submitted both a rebuttal and a subsequent amendment to the rebuttal of Dr. Narayanan's PFT studies to this office, and I therefore admit the amended rebuttal into evidence as Employer exhibit two (EX 2).[7]

Employer also submitted a conglomeration of Miner's medical records, the admissibility of which will be discussed below.[8]

[7] The rebuttal was written by Dr. Dahhan.
[8] *See pp*. 7-9.

X-RAYS

Exhibit	Date of X-Ray	Date of Reading	Physician/Qualification	Film Quality	Interpretation
DX 16	12/06/01	12/06/01	Baker[9]	2	1/0 pp
DX 19	12/06/01	01/19/03	Alexander / B-Reader[10]; BCR[11]	2	1/2 pp
DX 17	01/22/02	01/22/02	Dahhan / B-reader	1	Negative
DX 20	01/22/02	03/29/02	Spitz / B-Reader; BCR	1	Negative
DX 21	09/24/02	12/06/02	Miller / B-Reader; BCR	2	1/2 pq, B
DX 22	09/24/02	01/31/03	Poulos / B-Reader; BCR	2	Negative

PULMONARY FUNCTION TESTS

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Qualifying Results	Comments
DX 16 12/06/01	Fair/ Good	54/66.2[12]	2.24	4.22	74.0	53	No	
DX 17 01/22/02	Good/ Good	54/66.1	2.61	4.21	81.0	62	No	MVV invalid due to poor effort.
DX 21 11/04/02	Good/ Good	55/69.0	1.07	2.47	----	43	Yes	
DX 21 03/08/02	Good/ Good	50[13]/69.0	1.90	3.56	----	53	Yes[14]	

[9] At the time of the x-ray reading, Dr. Baker did not hold B-reader x-ray interpretation credentials. However, the August 29, 2005 "B-reader" list states that he was a B-reader from February 1, 1993 to January 31, 2001, and again from June 1, 2002 to present. He is also listed as an A-reader from February 1, 2001 to May 31, 2002.

[10] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

[11] A "BCR" is a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[12] The fact finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). As the four reports show varying heights from 66.1 to 69 inches, I will use the average and find the Miner's height to be 67.6 inches.

[13] The Medical record indicates Miner's age to be 50. However, the record clearly establishes through death certificate, marriage certificate, tax forms, other medical reports, and oral testimony that Miner was 55 years of age at the time of this examination. Therefore, I determine this to be a simple clerical error and calculate the qualifying results of Miner based on an age of 55.

[14] Qualifying result is based off Miner's height being 67.6 inches.

ARTERIAL BLOOD GAS STUDIES

Exhibit	Date	pCO_2	pO_2	Qualifying	Comments
DX 16	12/06/01	32	74	No	
DX 17	01/22/02	35.6	84.2	No	

Narrative Reports

Dr. Glen Baker examined Miner on December 6, 2001 and submitted a report. (DX 16). Dr. Baker considered the following: an employment history of twenty-seven years; a personal history of frequent colds, pneumonia (with hospitalization in 1999), attacks of wheezing, chronic bronchitis, arthritis, and seasonal allergies; a smoking history of thirty-nine pack year, with a recent cut-down to seven cigarettes a day; a ten year history of: 3 tablespoons of daily sputum, wheezing, dyspnea, and coughing; six months of chest pain; a year or orthopnea; shortness of breath of night, helped by a nebulizer; and a family history of high blood pressure, heart disease, tuberculosis, cancer, asthma, emphysema, and stroke. Dr. Baker diagnosed Coal Worker's Pneumoconiosis ("CWP") based on an abnormal chest x-ray and coal dust exposure. He also diagnosed chronic bronchitis based on Miner's history of cough, sputum production, wheezing, coal dust exposure, and history of cigarette smoking. Dr. Baker diagnosed COPD[15] with a mild obstructive defect based on pulmonary function tests, coal dust exposure, and cigarette smoking. Finally, Dr. Baker diagnosed hypoxemia based on Miner's PO_2 levels, coal dust exposure, and cigarette smoking. Dr. Baker opined that Miner's pulmonary impairment was mild and claimant possessed the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment.

Dr. Abdul Dahhan, M.D. is board-certified in both internal and pulmonary medicine and is a B-reader. Dr. Dahhan's medical report dated April 19, 2006, which was submitted post-hearing by Jericol Mining, examined the PTF's conducted on April 8, 2002 and November 4, 2002. Dr. Dahhan merely restates the results reached and offers his opinion as to the test's validity. He states that the first test is invalid because "of inconsistent effort with more than five percent variation among the three best FVCs." Dr. Dahhan notes that no bronchodilators were administered in the March 8 PFT test, and therefore he feels it is impossible to determine any reversibility.

Treatment Records

Employer submitted medical records from Harlan Appalachian Regional Healthcare[16] pursuant to 20 CFR Section 725.414(a)(4). Section 725.414(a)(4) allows for the admission of

[15] "Chronic Obstructive Pulmonary Disease"

[16] Included in the treatment notes are x-ray reports from several physicians. There is no evidence in the record as to the x-ray reading credentials of these physicians. §718.102(c). Also, these interpretations were all related to the treatment of Miner's condition, and not for the purpose of determining the existence or extent of pneumoconiosis. In addition, there is no record of the film quality for any of these x-rays. §718.102(b). Finally, the interpreting physicians did not provide an ILO classification for their readings. §718.102(b). As a result, these x-ray interpretations are not in compliance with the quality standards of §718.102 and Appendix A to Part 718. Therefore, while I shall admit the reports under Section 725.414(a)(4), I accord the x-ray interpretations contained in the

"any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease." §725.414(a)(4). Therefore, if the hospital admission or treatment was based on a pulmonary impairment, the record is admissible notwithstanding the limitations in Sections 725.414(a)(2) and (a)(3). The records are summarized as follows:

January 19, 1997: Radiology Report by Dr. Aguilar. This report relates to a car crash with no treatment for pulmonary impairment. Therefore, this record is inadmissible under Section 725.414(a)(4).

January 19, 1997: Observation Room History and Physical Examination Report by Dr. Gensler. This report also relates to the car crash. While Dr. Gensler mentions COPD, Miner is neither admitted nor received treatment for a pulmonary impairment. Therefore, this record is inadmissible under Section 725.414(a)(4).

January 19, 1997: Report of Operation by Dr. Gensler. This report relates to the car crash. Dr. Gensler mentions a cheek laceration and makes no mention of pulmonary impairment. Therefore, this record is inadmissible under Section 725.414(a)(4).

January 19, 1997: Radiology Report by Dr. Aguilar. This report relates to the car crash. While Dr. Aguilar mentions COPD, Miner is neither admitted nor received treatment for a pulmonary impairment. Therefore, this record is inadmissible under Section 725.414(a)(4).

The following records were obtained during a hospital admission for treatment of "mild respiratory distress," and are therefore admissible under Section 725.414(a)(4):

-November 16, 1998 History and Physical Examination Report by Dr. Ahmad
-November 16, 1998 Urine Analysis by Dr. Bathija
-November 16, 1998 Blood Analysis by Dr. Bathija
-November 16, 1998 Blood Gas Analysis by Dr. Ahmad
-November 16, 1998 Radiology Report by Dr. Tiu
-November 18, 1998 Radiology Report by Dr. Tiu
-November 18, 1998 Sputum Analysis by Dr. Whalen
-November 19, 1998 Blood Analysis by Dr. Whalen
-November 19, 1998 Sputum Analysis by Dr. Whalen
-November 20, 1998 Consultation Report by Dr. Yu
-November 20, 1998 Blood Analysis by Dr. Whalen
-November 21, 1998 Blood Analysis by Dr. Bathija
-November 23, 1998 Pathology Report by Dr. Ally
-November 30, 1998 Sputum Analysis by Dr. Whalen
-November 30, 1998 Radiology Report by Dr. Umer

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treatment records no weight for the purpose of determining whether Miner suffers from pneumoconiosis under § 718.202(a)(1).

November 30, 1998: All-Inclusive Medical Report by Dr. Ahmad discussing patient's recent hospitalization for pneumonia. As this is a respiratory impairment, it is therefore admissible under Section 725.414(a)(4).

December 14, 1998: All-Inclusive Medical Report by Dr. Ahmad regarding Miner's follow-up for pneumonia. Dr. Ahmad notes a shadow on an x-ray in the upper right lobe. As this record involves a respiratory impairment and its treatment, it is therefore admissible under Section 725.414(a)(4).

The following records were obtained during a hospital admission for treatment of shortness of breath, wheezing, and cough productive of yellowish sputum. As these are respiratory impairments, the records are therefore admissible under Section 725.414(a)(4):

-February 17, 1999: History and Physical Examination by Dr. Ahmad
-February 17, 1999: Blood Gas Analysis by Dr. Ahmad
-February 17, 1999: Radiology Report by Dr. Tiu
-February 17, 1999: Blood Analysis by Dr. Bathija (Batch JH87146)
-February 17, 1999: Urine Analysis by Dr. Bathija
-February 17, 1999: Blood Anlysis by Dr. Bathija (Batch JH87149)
-February 18, 1999: Radiology Report by Dr. Tiu
-February 19, 1999: Sputum Analysis by Dr. Bathija
-February 21, 1999: Blood Gas Analysis by Dr. Ahmad
-February 21, 1999: Blood Analysis by Dr. Bathija (Batch JH87790)
-February 21, 1999: Blood Analysis by Dr. Bathija (Batch JH87787)
-February 21, 1999: Sputum Analysis by Dr. Whalen (Batch SY57922)
-February 21, 1999: Sputum Analysis by Dr. Whalen (Batch SY57898)
-February 21, 1999: Blood Analysis by Dr. Whalen (Batch SY57898)
-February 21, 1999: Blood Analysis by Dr. Whalen (Batch SY57836)
-February 21, 1999: Discharge Summary by Dr. Ahmad
-February 23, 1999: Blood Analysis by Dr. Whalen (Batch SY58174)
-February 23, 1999: Blood Analysis by Dr. Whalen (Batch SY58214)

March 1, 1999: All-Inclusive Medical Report by Dr. Ahmad for purposes of a follow up of previous hospitalization. This report includes a PFT. As this report is based on treatment for a respiratory impairment, it is therefore admissible under Section 725.414(a)(4).

December 27, 1999: All-Inclusive Medical Report by Dr. Yu when Miner came in complaining of low back pain and shortness of breath. As this record involves a respiratory impairment and its treatment, it is therefore admissible under Section 725.414(a)(4).[17]

[17] This report has a brief summary of PFT results. These interpretations were all related to the treatment of Miner's condition, and not for the purpose of determining the existence or extent of pneumoconiosis. However, as the summary of the PFTs does not comply with the requirements of Sections 718.103(a) or (b), I accord the PFT interpretations contained in the treatment records no weight for the purpose of determining whether Miner suffers from pneumoconiosis under § 718.202(a)(1).

The above records from Harlan Appalachian Regional Healthcare which were deemed admissible under Section 725.414(a)(4) are admitted into evidence as EX 3.

Smoking History

Dr. Baker's examination stated that Miner began smoking at age fifteen at a pack a day. It is indicated that Miner recently reduced his intake to seven cigarettes a day. This would put his smoking history at roughly thirty-five pack years and four quarter pack years. Dr. Dahhan lists Miner's smoking age beginning at eighteen, with a pack a day, cutting back to a quarter pack a day three to four years ago. This would place Miner's intake at about thirty-two pack years, and four quarter pack years. At the hearing, Claimant stated that Miner would often stop smoking for various periods of time, up to a year. Given all the evidence, I find that Miner smoked for thirty-three pack years.

DISCUSSION AND APPLICABLE LAW

Claimant's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

1. Is a miner as defined in this section; and

2. Has met the requirements for entitlement to benefits by establishing that he:

   (i) Has pneumoconiosis (*see* § 718.202);

   (ii) The pneumoconiosis arose out of coal mine employment (*see* § 718.203);

   (iii) Is totally disabled (*see* § 718.204(c));

   (iv) The pneumoconiosis contributes to the total disability (*see* § 718.204(c)); and

3. Has filed a claim for benefits in accordance with the provisions of this part.

§ 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under Section 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.

(1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to: coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

§§ 718.201(a-c).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under Section 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. The record contains three chest x-rays, with two interpretations per x-ray.

Dr. Baker interpreted the December 6, 2001 film as positive for pneumoconiosis with a 1/0 pp reading. Dr. Alexander, dully-certified as a radiologist and B-reader, also interpreted the film as positive for pneumoconiosis with a 1/2 pp reading. Both physicians classified the film quality as two. Based on these interpretations, I find that the December 2, 2001 film is positive for the presence of pneumoconiosis.

Dr. Dahhan, a B-reader, interpreted the January 22, 2002 as negative for pneumoconiosis. Dr. Spitz, dully-certified as a radiologist and B-reader, also found the film as negative for pneumoconiosis. Both physicians classified the film quality as one. Based on these interpretations, I find that January 22, 2002 film as negative for the presence of pneumoconiosis.

Dr. Miller, dully-certified as a radiologist and B-reader, interpreted the September 24, 2002 x-ray as positive for pneumoconiosis with a 1/2 pq, B reading. Dr. Poulos, also a dully-certified radiologist and B-reader, interpreted the film as negative for pneumoconiosis. Both physicians classified the film quality as two. Given that there are two contrasting positions of equally qualified physicians and Claimant bears the burden to prove pneumoconiosis by a preponderance of the evidence, I find that the September 24, 2002 x-ray is negative for pneumoconiosis.

I have determined that the December 6, 2001 film is positive for pneumoconiosis. However, I have also determined that both the January 22, 2002 and the September 24, 2002 films are negative for pneumoconiosis. In all, there are three physicians who found the presence of pneumoconiosis, and three who found no presence of pneumoconiosis. Each position is supported by BCR and B-reader qualified experts, with the negative interpreters holding greater credentials. Given the greater weight of experts and my conclusions above, I find that the preponderance of the chest x-ray evidence establishes that there is no pneumoconiosis. Therefore, I find that Claimant has failed to establish the presence of pneumoconiosis under subsection (a)(1).

(2) Under Section 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. The evidentiary record does not contain any biopsy evidence. Therefore, I find that the Claimant has failed to establish the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. If the record contains any evidence indicating the existence of complicated pneumoconiosis, the administrative law judge must specifically address it, and, if it is rejected, must provide a legitimate explanation. *Shultz v. Borgman Coal Co.*, 1 BLR 1-233 (1977).

In this case, the presumption of Section 718.304 could apply because Dr. Miller's reading of the September 24, 2002 x-ray shows evidence of complicated pneumoconiosis. Dr. Miller notes that he sees opacities that are greater than one centimeter in diameter, indicating an extreme advanced stage of pneumoconiosis. While Dr. Miller possesses high credentials, his interpretation is only one of six which finds *any* tracings of complicated pneumoconiosis. While this is the last of the three x-rays taken of a potentially progressive disease[18], it is important to note that an equally qualified physician found this x-ray to be entirely negative for any tracings of pneumoconiosis. Because Dr. Miller's was only one of six which diagnosed complicated pneumoconiosis[19], and an equally qualified physician found the same x-ray to be negative, I find

[18]*See Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), where the court states pneumoconiosis is a "progressive and degenerative disease," and *Mullins Coal Co. of Virginia v. Director, OWCP*, 483 U.S. 135 (1987), *reh'g denied*, 484 U.S. 1047 (1988), where the Court states pneumoconiosis is a "serious and progressive pulmonary condition."

[19] Where a significant amount of time separates medical evidence, it may be appropriate to accord greater weight to the most recent evidence of record. *Clark v. Karst-Robbins Coal Co*., 12 B.L.R. 1-149 (1989) (en banc); *Casella v. Kaiser Steel Corp*., 9 B.L.R. 1-131 (1986). Here, the most recent x-ray is only separated from the second x-ray by nine months and the first x-ray by ten. Because there is little time between the three x-rays, I have accorded the

the Miner does not suffer from complicated pneumoconiosis. This leaves two other possible presumptions under Section 718.202(a)(3).

Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under Section 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under Section 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co*., 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director*, OWCP, 7 B.L.R. 1-860 (1985).

Dr. Baker opined Miner has pneumoconiosis based solely upon his own readings of a chest x-ray and Miner's history of dust exposure. (DX 12). In *Cornett v. Benham Coal Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute sound medical judgment under Section 718.202(a)(4). *Id.* at 576. The Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993) (*citing Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). In *Taylor*, the Board explained that the fact that a miner worked for a certain period of time in the coal mines alone does not tend to establish that he has any respiratory disease arising out of coal mine employment. *Taylor*, 8 B.L.R. at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray... and not a reasoned medical opinion." *Id*.

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most recent x-ray only slightly more weight than the original two under *Cranor*. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.).

Dr. Baker provided Miner's Department of Labor sponsored pulmonary examination on December 6, 2001. Acknowledging that Dr. Baker performed other physical and objective testing, he listed that he expressly relied on Miner's positive x-ray and coal dust exposure for his clinical determination of pneumoconiosis. Moreover, he failed to state how the results from his other objective testing might have impacted his diagnosis of pneumoconiosis. As he does not indicate any other reasons for his diagnosis of pneumoconiosis beyond the x-ray and exposure history, I find his report with respect to a diagnosis of clinical pneumoconiosis is unreasoned and give it little weight.

In addition, Dr. Baker diagnosed Miner with chronic bronchitis based on his history of cough, sputum production and wheezing. Dr. Baker asserts that the chronic bronchitis is the result of Miner's coal dust exposure and a cigarette smoking. Although Dr. Baker states Miner's disease is the result of coal dust exposure, his diagnosis is based purely on Miner's medical history and relies on no objective data. Further, Dr. Baker failed to provide an explanation as to why these conditions were not wholly attributable to Miner's thirty-three pack year smoking history. Therefore, I find Dr. Baker's determination of legal pneumoconiosis in this instance to be conclusory and unreasoned.

Dr. Baker also diagnosed Miner with COPD with a mild obstructive defect based on Miner's PFT. He attributes this condition to Miner's history of coal dust exposure and cigarette smoking. Here, the diagnosis is based on objective medical data, but Dr. Baker fails to provide an explanation as to why these conditions were not wholly attributable to Miner's smoking history. However, because Dr. Baker lists coal dust exposure as the primary cause of COPD and bases his diagnosis on objective medical data, I find his determination of legal pneumoconiosis in this instance to be well-reasoned.

Last, Dr. Baker diagnosed Miner with hypoxemia based on Miner's PO_2. He attributes this condition to Miner's history of coal dust exposure and cigarette smoking. Just as above, Dr. Baker basis his diagnosis on objective medical data, but fails to explain as to why these conditions were not wholly attributable to Miner's smoking history. However, because Dr. Baker lists coal dust exposure as the primary cause of the hypoxemia and basis his diagnosis on objective medical data, I find his determination of legal pneumoconiosis in this instance to be well-reasoned.

Because Dr. Baker bases two diagnoses of pulmonary impairments upon objective medical data and I find them well reasoned, I accord Dr. Baker's diagnosis of legal pneumoconiosis probative weight.

Dr. Dahhan examined Miner on January 2, 2002.[20] After considering the medical records from Harlan Appalachian Regional Healthcare[21], some of which are inadmissible or received no

[20] While this medical opinion is contained within the record, for purposes of making a decision, Employer indicated that he wished that it not be considered by leaving the fields on page five of the United States Department of Labor Office of Administrative Law Judges Black Lung Benefits Act Evidence Summary Form blank. However, as Dr. Dahhan's conclusions benefit the employer and the result does not change with the report's inclusion, in the interest of justice and efficiency, I have provided a brief summary of Dr. Dahhan's report.

[21] *See pp.* 7-9 above for a detailed account of these records.

weight[22], a normal clinical evaluation of the chest, normal spirometry, normal arterial blood gasses and a negative chest x-ray, Dr. Dahhan opined that there is insufficient objective data to justify a diagnosis of coal workers' pneumoconiosis. When a physician considers inadmissible evidence, an Administrative Law Judge may factor in the physician's reliance upon the inadmissible evidence in deciding the opinion's weight and admissibility. *Brahser v. Pleasant View Mining Co. Inc.*, B.R.B. No. 05-0570 BLA (Apr. 28, 2006). Dr. Dahhan makes clear reference to the x-rays and PFTs conducted at Harlan Appalachian Regional Healthcare. However, Dr. Dahhan makes no distinction as to how he weighs his personal observations with the Harlan Appalachian Regional Healthcare records. Therefore, after attempting to factor the physician's reliance upon those reports with his overall finding, I find that Dr. Dahhan's medical opinion unreasoned and afford it little weight.

In addition, Dr. Dahhan notes that Miner has a history compatible with chronic obstructive lung disease and states that his medical records[23] indicate treatment for the disease in the past. Dr. Dahhan opines that the records indicate that Miner's condition was improved when Miner decreased his smoking and alcohol intake. However, after considering the medical records, examining Miner's x-ray, normal pulmonary function studies, normal blood gases, and a clinical examination of the chest, Dr. Dahhan opines that there is no evidence of pulmonary impairment associated with coal dust exposure. Dr. Dahhan iterates that Miner's symptoms of bronchitis are wholly attributable to his lengthy smoking history. However, Dr. Dahhan makes no distinction here as to how he weighs his personal observations with the Harlan Appalachian Regional Healthcare records. Therefore, after attempting to factor the physician's reliance upon those reports with his overall finding, I find that Dr. Dahhan's medical opinion unreasoned and afford it little weight.

Employer filed a post hearing medical report for rebuttal on May 1, 2006. However, the Employer amended filing on June 19, 2006 to rebut the pulmonary function studies conducted on March 8, 2002 and November 4, 2002. As such, the report will be discussed in turn below on pages 17-18 and not considered at this juncture.

The record contains only one reasoned and documented medical opinion. Dr. Baker opined that the Miner suffers from legal pneumoconiosis. As no evidence was submitted to contradict Dr. Baker's report, I find that the Claimant has established the presence of pneumoconiosis by a preponderance of the evidence under subsection (a)(4).

Claimant has established the presence of pneumoconiosis under subsection (a)(1)-(4). Therefore, after weighing all evidence of pneumoconiosis together under Section 718.202 (a), I find that Claimant has established the presence of pneumoconiosis.

[22] Inadmissible: Dr. Gensler's report dated January 19, 1997; and those that were deemed to have no weight: Chest x-rays from November 30, 1998 and November 18, 1998 and the PFT dated December 27, 1999.
[23] Dr. Dahhan makes reference to the records from Harlan Appalachian Regional Healthcare.

Causation of Pneumoconiosis

Once pneumoconiosis has been established, the burden is upon the Claimant to demonstrate by a preponderance of the evidence that the pneumoconiosis arose out of the miner's coal mine employment. 20 C.F.R. § 718.203 (2003).

If a miner suffers from pneumoconiosis and was employed ten years or more in the Nation's coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b); *Stark v. Director,* OWCP, 9 B.L.R. 1-36 (1986); *Hucker v. Consolidation Coal Co.*, 9 B.L.R. 1-137 (1986). As I have found that Claimant has established seventeen years of coal mine employment, and I found that Miner suffered from pneumoconiosis, Claimant is entitled to the rebuttable presumption set forth in Section 718.203(b) that Miner's pneumoconiosis arose out of his coal mine employment.

The Employer offers no direct evidence which rebuts the Section 718.203(b) presumption, other than the report of Dr. Dahhan, which the Employer chose not to put forth for consideration. Even had the Employer put this report forward, the only evidence Dr. Dahhan gives is that Miner's smoking history has contributed to his development of the "symptoms of bronchitis." However, Dr. Dahhan does not explain the numerous diagnoses of COPD within the Harlan Appalachian Regional Hea1thcare records and how they can be explained by cigarette smoking. Further, Dr. Dahhan does not articulate how he diagnoses the symptoms of bronchitis, and it is likely that it came from evidence which has been excluded in this record. Also, as I have found Dr. Dahhan's report to carry little weight, the presumption set forth in Section 718.203(b) remains. Thus, I find that Miner's pneumoconiosis arose out of his coal mine employment.

Total Disability

Where the evidence supports a finding of pneumoconiosis arising out of coal mine employment, to be entitled to benefits under the Act, the Claimant must next prove that Miner is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of Section 718.204(b) or the irrebuttable presumption referred to in Section 718.204(b). The Board has held that under Section 718.204(b), all relevant probative evidence, both "like and unlike" must be weighed together, regardless of the category or type, in the determination of whether the Miner is totally disabled. *Shedlock v. Bethlehem Mines Corp*., 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp*., 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

I have determined that Claimant has not established that Miner suffered from complicated pneumoconiosis.[24] Therefore, the irrebuttable presumption of Section 718.304 does not apply.

[24] *See pp.* 12-13 above.

Total disability can be shown under Section 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. Also, in *Crappe v. U.S. Steel Corp*., 6 B.L.R. 1-476 (1983), the Board held that a non-conforming PFT may be entitled to probative value where the study was not accompanied by statements of miner cooperation and comprehension and the ventilatory capacity was above the table values. This is because any deficiency in cooperation and comprehension could only result in higher results.

The first PFT contained in the record was conducted on December 6, 2001 by Dr. Baker. The results were non-qualifying and the Miner was deemed to give fair cooperation and good comprehension. As there is no indication the test was not in conformity with Section 718 Appendix B(1) or (2), I find the results to be of probative weight.

The second PFT was conducted on January 22, 2002 by Dr. Dahhan. The results were non-qualifying and the Miner was deemed to give both good cooperation and comprehension. As there is no indication the test was not in conformity with Section 718 Appendix B(1) or (2), I find the results to be of probative weight.

The third PFT was conducted on November 4, 2002 and interpreted by Dr. Narayanan. The results were qualifying and the Miner was deemed to give both good cooperation and comprehension. In Employer's rebuttal report submitted on June 19, 2006, Dr. Dahhan states this PFT is invalid as it "does not meet the Department of Labor criteria for validation because of inconsistent effort with more than 5% variation among the three best FVCs." Such a qualification, however, is not found in the regulations.[25] While Dr. Narayanan[26] notes that Miner put forth good cooperation, Dr. Dahhan, holding superior credentials,[27] states that the test should be invalidated due to inconsistent effort. Because of Dr. Dahhan's superior credentials with regard to pulmonary medicine, and there is no indication the test was not in conformity with Section 719 Appendix B(1) or (2), I give the November 4, 2002 PFT some weight.

The fourth PFT was conducted on March 8, 2002 and interpreted by Dr. Narayanan. The results were qualifying and the Miner was deemed to give both good cooperation and comprehension. As there is no indication the test was not in conformity with Section 718 Appendix B(1) or (2), I find the results to be of probative weight.

I have given the first two negative PFT readings probative weight, the third positive reading with some weight, and the fourth probative weight. As the negative PFTs hold more weight, Claimant has failed to establish by a preponderance total disability. Therefore, I find that Claimant has failed to establish total disability under subsection (b)(2)(i).

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[25] The most resembling standard contained in the regulation requires that the variation between the *two* largest FEV's of the three acceptable tracings should not exceed five percent of the largest FEV1 *or* 100ml, whichever is greater. §718 App. B(2)(ii)(G) (*emphasis added*). The PFT conducted on November 4, 2002 meets this standard.

[26] Dr. Narayanan is certified by the American Board of Internal Medicine.

[27] Dr. Dahhan is certified by both the American Board of Internal Medicine and the American Board of Pulmonary Medicine.

Total disability can be demonstrated under Section 718.204(b)(2)(ii) if the results of ABGs meet the requirements listed in the tables found at Appendix C to Part 718. The ABGs conducted on December 6, 2001 and January 22, 2002 did not produce qualifying values that meet the requirements of the tables found at Appendix C to Part 718. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(ii).

Total disability may also be shown under Section 718.204(b)(2)(iii) if the medical evidence indicates that Miner suffers from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that Miner suffers from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment.

The exertional requirements of the Miner's usual coal mine employment must be compared with a physician's assessment of the Miner's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a prima facie finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to section 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. Section 718.204(a); *Jewell Smokeless Coal Corp. v. Street,* 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the Claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Dr. Baker, a Board-certified Internist and Pulmonologist, even though he diagnosed pneumoconiosis, opined that Miner's respiratory impairment was mild. Considering the Miner's last coal mine employment as operating the shuttle car, Dr. Baker stated that Miner possessed the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Because Dr. Baker considered Miner's condition and compared it to his former employment, I find it well reasoned and afford it probative value.

As there is no determination put forth which states that Miner could not have returned to his last CME, I find that Claimant has not proven by a preponderance that Miner could not return to work.[28] Thus, I find Miner retained the functional respiratory capacity to return to his last coal mining job or one of comparable and gainful work.

[28] Dr. Dahhan's medical report was not put forth for consideration by either party. However, he concluded that Claimant possessed no impairment and could return to his last coal mine employment. Thus, including the report would not change the result.

Accordingly, taken as a whole, the medical narrative evidence does not support a finding of total pulmonary disability. As a result of non-qualifying PFTs, normal ABG's, and the well-reasoned opinion of Dr. Baker, I find that Claimant has failed to establish total pulmonary disability or total disability due to pneumoconiosis under Section 718.204(b)(iv).

Claimant has failed to establish that Miner was totally disabled under subsection (b)(i)-(iv). Therefore, after weighing all evidence concerning total disability together under Section 718.204 (b), I find that Claimant has failed to establish that Miner was totally disabled due to pneumoconiosis.

Entitlement

Claimant has failed to establish that Miner was totally disabled due to pneumoconiosis arising out of coal mine employment. Therefore, I find that Claimant is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the Claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of J.R. for benefits under the Act is hereby DENIED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013- 7601. *See* 20 C.F.R. §§ 725.478 and 725.479. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).